Served: July 14, 1992

NTSB Order No. EA-3613

UNITED STATED OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of June, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

SE-11330

v.

LAWRENCE R. SHUSTER,

Respondent.

OPINION AND ORDER

Respondent has appealed from the written initial decision of Administrative Law Judge William A. Pope, II issued on October 7, 1991, following a hearing held on January 17, 1991.[1] By that decision, the law judge affirmed the Administrator's revocation of respondent's private pilot and third class medical certificates. We grant the appeal and dismiss the Administrator's order.[2]

[1]The initial decision is attached. The law judge had granted respondent's motion to waive emergency procedures, thus removing the 60-day deadline. The case was delayed, by agreement of the parties, to await related action (see discussion, infra) in another forum.

[2]The Administrator did not reply to respondent's appeal.

The Administrator's emergency order of revocation, as amended, alleged violations of two Federal Aviation Regulations ("FAR"), at 14 C.F.R. 61.15(a)(2) and 67.20(a)(1).[3] Pursuant to the latter rule, the Administrator charged that, on two aeromedical applications, respondent falsely represented that he was a medical doctor, and failed to report in paragraphs 21(v) and (w) of the applications that he had been convicted of various crimes, including forgery, criminal use of drug paraphernalia, and two traffic violations.[4] Pursuant to § 61.15(a)(2), the Administrator cited the drug conviction in seeking revocation.

At the hearing before the law judge, the Administrator withdrew the forgery charge. The parties also agreed that the law judge would hold his decision in abeyance, pending state court appellate action on respondent's appeal of his drug conviction. In March 1991, the Supreme Court of the State of New

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[3] § 61.15(a)(2) provides:

> (a) A conviction for the violation of any Federal or state statute relating to the growing, processing, manufacture, sale, disposition, or importation of narcotic drugs, marihuana, or depressant or stimulant drugs or substances is grounds for--
>
> (2) Suspension or revocation of any certificate or rating issued under this part.

§ 67.20(a)(1) provides:

> (a) No person may make or cause to be made--
>
> (1) Any fraudulent or intentionally false statement on any application for a medical certificate under this part[.]

[4] As will be clear infra, the details of the forgery and drug charges are no longer relevant.

York reversed that conviction.

In his initial decision, the law judge therefore dismissed the § 61.15(a)(2) claim, leaving only the issues related to information respondent provided on the aeromedical applications. The law judge further found that respondent was entitled to call himself a doctor, medical doctor, or M.D. (having been granted a doctor of medicine degree from the American University of the Caribbean) and, therefore, this was not a fraudulent or false statement.

Regarding the remainder of the § 67.20(a)(1) claim, the law judge found sufficient evidence to uphold the Administrator's order. First, he found that, on the date respondent signed the second of the two applications (July 28, 1989), he knew that he was scheduled for trial 3 days hence on the drug and other charges. Thus, reasoned the law judge, respondent had a duty on July 28th to advise the FAA that his case had been referred to trial and a possibility of conviction existed. Initial decision at 8. Alternatively, respondent had a duty on and after July 31st to advise the FAA of his conviction. Id. at 8-9.

Second, the law judge found that certain of respondent's traffic violations constituted convictions and, therefore, he falsely reported in ¶ 21(v) of his applications that he had no traffic convictions. Id. at 9. Exhibit A-4 contained an abstract of respondent's driving record. The law judge noted "at least six, and apparently nine, traffic offenses between April 24, 1980, and May 14, 1988, all of which resulted in [license]

suspensions because he failed to answer summons." Id. The law judge found this to be the equivalent of traffic convictions.

In this aspect of his decision, the law judge did not rely on the two convictions identified in the Administrator's order.[5] He found, as respondent had claimed, that the correct date was July 31, 1989, not March 28, 1989. Id. at 4, fn.8.[6] (Apparently, these charges were tried at the same time as the drug charge.)

As a result of his traffic-related findings, the law judge concluded that respondent was untruthful and could not be depended upon to observe the regulations and requirements for safe aircraft operations.[7] Upon careful review of the record, we are unable to sustain either of the law judge's bases for affirming the Administrator's order.

The aeromedical application, at ¶ 21, requires that information regarding "traffic" or "other" convictions be produced. At the time the application was signed, the drug-related trial had not even begun. We simply cannot find that the application, as written, requires that information about pending,

[5]As pertinent, that order (¶ 3(c)) charged: " Specifically, you failed to state that you were . . . convicted of two vehicle and traffic violations by the State of New York on or about March 28, 1989." These convictions were for aggravated unlicensed operations on December 10, 1984, and December 2, 1987.

[6]We note that the July 28, 1989 date in footnote 8 of the initial decision should read March 28, 1989.

[7]The law judge noted, but did not rely on, the fact of two enforcement actions against respondent by the FAA.

unresolved matters be disclosed. Moreover, the Administrator did not argue at the hearing that this was his interpretation of the requirement. Thus, reliance on the July 31, 1989 drug or traffic convictions is misplaced.

We are left therefore with respondent's traffic violation history prior to July 28, 1989. The law judge found this history sufficient to constitute convictions that should have been reported.[8] On appeal, respondent raises two grounds for reversing this conclusion: 1) there is no basis in the record to find that respondent knew that failing to answer a summons would result in a traffic conviction; and 2) in using these traffic incidents to support a violation of § 67.20(a)(1), the law judge went beyond the complaint and the arguments made by the Administrator.

Although we might agree with the law judge that these matters are convictions, as that term is generally understood, we must agree with respondent on due process grounds. As noted, the § 67.20 (a)(1) charge in the complaint rested on three premises: the medical doctor certification; the alleged forgery; and the alleged "two vehicle and traffic violations . . . on or about March 28, 1989." The law judge rejected the first, and dismissed the second at the Administrator's request. The judge did not rely on the third, and in view of the date of the actual

[8]Although he did not discuss it, it appears that the law judge also rejected respondent's testimony that, because his current state of residence (Texas) had no violations listed for him, he believed he had a clean traffic record. Transcript at 266-267.

conviction, our earlier analysis would preclude its use to support this charge.

Although the complaint could have been framed more broadly, it did not mention any other traffic incidents, nor did the Administrator amend it further to include those items. We agree with respondent that, in the circumstances, it was error for the law judge to rely on them to affirm the complaint.[9] Administrator v. Bell, 5 NTSB 289 (1985) (having rejected the basis cited by the Administrator, the law judge should not have undertaken to determine whether the charges were sustainable on some other ground not alleged by the Administrator; doing so denied respondent adequate notice and opportunity to defend against such charges).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted; and

2. The Administrator's emergency order of revocation is dismissed.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[9]Thus, we need not address respondent's other claim of error.